NO. 80-1113

IN THE

Supreme Court of the United States

JANUARY TERM 1981

BYRON PETER ATHANASIOU and
PETER JAMES ELLIOTT,
Petitioners,

vs.

STATE OF NEW JERSEY,
Respondent.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

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Questions Presented

The questions presented by the instant petition involve the impact and applicability of this Court's recent decision in *Delaware* v. *Prouse,* 440 U.S. 648 (1979). The questions specifically presented are:

(1) Is the prohibition against random motor vehicle stops enunciated in *Prouse* applicable in situations where a vehicle is halted for articulable reasons in order to inspect its physical condition and safety?

(2) Assuming that a random stop is involved, is the decision of the New Jersey Supreme Court in *State* v. *Carpentieri,* 82 N.J. 546, 414 A.2d 966 (1980), according prospective effect only to the *Prouse* decision in conformity with other decisions of this Court affording prospective application only to Fourth Amendment decisions, especially where *Prouse* invalidated random automobile stops, heretofore sanctioned in New Jersey by the decisions rendered in *State* v. *Gray,* 59 N.J. 563, 567, 285 A.2d 1, 5 (1971); *State* v. *Marchitto,* 132 N.J. Super. 511, 514; 334 A.2d 354, 357 (App. Div. 1974), certif. den. 68 N.J. 163, 343 A.2d 450 (1975); *State* v. *Gammons,* 113 N.J. Super. 434, 437, 274 A.2d 69, 72 (App. Div. 1971), aff'd o.b. 59 N.J. 451, 283 A.2d 897 (1971); *State* v. *Braxton,* 111 N.J. Super. 191, 196, 268 A.2d 40, 45 (App. Div. 1970); rev'd on other grounds 57 N.J. 286, 271 A.2d 713 (1970); *State* v. *Kabayama,* 98 N.J. Super. 85, 88; 236 A.2d 164, 167 (App. Div. 1967); aff'd o.b. 52 N.J. 507; 246 A.2d 714 (1968); *Blanchard* v. *Town of Kearny,* 145 N.J. Super. 246, 248; 367 A.2d 464, 468 (Law Div. 1976), aff'd o.b. 153 N.J. Super. 158, 379 A.2d 288 (App. Div. 1977)?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
United States Constitution, Article VI, Clause 2	2
United States Constitution, Amendment IV	2
United States Supreme Court Rule 17	2
Constitution of the State of New Jersey, Article 1, Paragraph 7	3
N.J. Stat. Ann. 24:21-19 (West). Prohibited Acts	4
N.J. Stat. Ann. 24:21-20 (West). Prohibited Acts	4
N.J.S.A. 39:4-45 (West) Delaying Traffic Prohibited	5
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	7
ARGUMENT:	
Point I—The principles of the Delaware v. Prouse are not applicable to the instant factual situation	7
Point II—The petition does not present a substantial question because this court's prior decisions indicate that Delaware v. Prouse should be applied prospectively only, and thus not to the instant matter	9
CONCLUSION	14

PAGE

Cases Cited

Almeida-Sanchez v. United States, 413 U.S. 266 (1973) 11

Arkansas v. Sanders, 442 U.S. 753 (1979) 13

Blanchard v. Town of Kearny, 145 N.J. Super. 246, 367 A.2d 464 (Law Div. 1976), aff'd o.b. 153 N.J. Super. 158, 379 A.2d 288 (App. Div. 1977) ..... i, 13

Brown v. Louisiana, —— U.S. ——, 100 S.Ct. 2214 (1980) 12

Brown v. United States, 422 U.S. 916 (1975) 10

Delaware v. Prouse, 440 U.S. 648 (1979) .....i, 7-14

Desist v. United States, 394 U.S. 244 (1969) 10, 11

Gosa v. Mayden, 413 U.S. 665 (1975) 10

Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932) 10

Johnson v. New Jersey, 384 U.S. 719 (1960) 12

Linkletter v. Walker, 381 U.S. 618 (1965) 10

Mapp v. Ohio, 367 U.S. 643 (1961) 10

State v. Braxton, 111 N.J. Super. 191, 268 A.2d 40 (App. Div. 1970), rev'd on other grounds 57 N.J. 286 A.2d 713 (1970) ..... i, 13

State v. Carpentieri, 82 N.J. 546, 414 A.2d 966 (1980) .....i, 7, 12, 13

State v. Gammons, 113 N.J. Super. 434, 274 A.2d 69 (App. Div. 1971), aff'd o.b. 59 N.J. 451, 283 A.2d 897 (1971) ..... i, 13

State v. Gray, 59 N.J. 563, 285 A.2d 1, 5 (1971) ..... i, 13

State v. Hock, 54 N.J. 526 (1969), cert. den. 399 U.S. 930 (1970) 8

PAGE

State v. Howery, 80 N.J. 563, 401 A.2d at 635 (1979) .. 12-14

State v. Kabayama, 98 N.J. Super. 85, 236 A.2d 164 (App. Div. 1967), aff'd o.b. 52 N.J. 507, 246 A.2d 714 (1968) ..... i, 13

State v. Kahlon, 172 N.J. Super. 331, 411 A.2d 1178 (App. Div. 1980) 13

State v. Mann, 171 N.J. Super. 173, 408 A.2d 440 (App. Div. 1979) 13

State v. Marchitto, 132 N.J. Super. 511, 334 A.2d 354 (App. Div. 1974), certif. den. 68 N.J. 163, 343 A.2d 450 (1975) ..... i, 13

State v. Patino, 80 N.J. 1, 5 n.2, 401 A.2d 1094 (1980) 12

Stevens v. New Jersey, —— U.S. ——, 28 Cr.L. 4062 (Docket No. 80-135, cert. den. November 3, 1980) 9

Stone v. Powell, 428 U.S. 465 (1976) 10

Stovall v. Denno, 388 U.S. 293 (1967) 11

United States v. Peltier, 422 U.S. 531 (1975) 10-13

Williams v. United States, 401 U.S. 646 (1970) 10, 11

United States Constitution Cited

Article VI, Clause 2 2

Fourth Amendment 2, 10, 13

New Jersey Constitution Cited

Article 1, Paragraph 7 3

PAGE

Statutes Cited

N.J.S.A. 24:21-19(a)(1) 6
N.J.S.A. 24:21-20(a)(2) 6
N.J.S.A. 39:3-29 13
N.J.S.A. 39:4-45 5
N.J.S.A. 39:4-56 8

Rule Cited

United States Supreme Court Rule:
17 2

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BRIEF IN OPPOSITION

Opinions Below

The order of the Supreme Court of New Jersey denying petitioner's petition for certification to the Superior Court of New Jersey Appellate Division, —— N.J. ——, —— A.2d —— (1980), is appended to petitioner's Petition for Certiorari as Appendix A-4. The unreported opinion of the Superior Court of New Jersey, Appellate Division is appended to the Petition as Appendix A-1 to A-3. The Su-

perior Court of New Jersey, Law Division, Passaic County, did not issue a written opinion; its oral ruling denying petitioner's motion to suppress evidence appears in the transcript of November 20, 1979, at page 19.

United States Constitution, Article VI, Clause 2.

> This Constitution, and the Laws of the United States which shall be made in pursuant thereof; and all Treaties made, or which shall be made, under authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.

United States Constitution, Amendment IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Supreme Court Rule 17.

> Considerations Govering Review of Certiorari
>
> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

(2) The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

Constitution of the State of New Jersey, Article 1, Paragraph 7.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, except upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

N.J. Stat. Ann. 24:21-19 (West)

Prohibited acts.

A. Manufacturing, distributing, dispensing—Penalties

a. Except as authorized by this act, it shall be unlawful for any person knowingly or intentionally:

(1) To manufacture, distribute, or dispense, or to possess or have under his control with intent to manufacture, distribute, or dispense a controlled dangerous substance; or

* * *

b. Any person who violates subsection a. with respect to:

* * *

(2) A substance, in a quantity of one ounce or more including any adulterants or dilutants, classified in Schedules I or II which is a narcotic drug, provided that there are included at least 3.5 grams of the pure free base Schedule I or II narcotic drug, is guilty of a high misdemeanor and shall be punished by imprisonment for up to life, a fine of not more than $25,000.00, or both; or

* * *

N.J. Stat. Ann. 24:21-20 (West)

Prohibited acts.

B. Possession, use or being under influence—Penalties.

a. It is unlawful for any person, knowingly or intentionally, to obtain, or to possess, actually or constructively, a controlled dangerous substance unless

such substance was obtained directly, or pursuant to a valid prescription or order from a practioner, while acting in the course of his professional practice, or except as otherwise authorized by this act. Any person who violates this section with respect to:

* * *

(2) A substance, in a quantity of 1 ounce or more including any adulterants or dilutants, classified in Schedule I or II which is a narcotic drug, provided that there are included at least 3.5 grams of the pure free base Schedule I or II narcotic drug, is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 7 years, a fine of no more than $15,000.00, or both;

* * *

N.J.S.A. 39:4-56

Delaying Traffic Prohibited.

No person should drive or conduct a vehicle in such condition, so constructed or so loaded as to be likely to cause delay in traffic or accident to man, beasts or property.

Statement of the Case

On February 24, 1979, at approximately 3:00 p.m., State Trooper William Bergen of the New Jersey State Police observed a 1976 white Cadillac automobile with Florida license plates travelling northbound on the Garden State Parkway in the center lane at a noticeably slow rate of speed of 50 miles per hour. Bergen further observed that the rear of the vehicle was extremely low to the ground and that both rear tires appeared to be going flat. Fear-

ful of the potential safety hazards resulting therefrom, Bergen signalled for the vehicle to pull over to the side of the road. Petitioner Anthanasiou was the operator of the vehicle. Upon request he produced a valid driver's license and identification credentials for the vehicle. During this time Petitioner Elliott was apparently asleep in the rear seat of the vehicle. Bergen peered inside the vehicle to ascertain whether there were weapons secreted in the vehicle. Immediately he detected a strong odor of raw marijuana emanating from the rear of the vehicle. Upon closer examination, Bergen further observed numerous marijuana seeds on the floor of the vehicle. Bergen was able to identify the odor of raw marijuana due to his extensive background in narcotics investigations.

Due to the strong odor of marijuana emanating from the vehicle, the extremely low position of the trunk and the fact that petitioners were travelling from Florida, Bergen inquired as to what substance was weighing down the trunk of the vehicle. Petitioner Anthanasiou appeared extremely nervous and agitated. Bergen then requested that Anthanasiou open the trunk of the vehicle. Bergen informed Anthanasiou, however, that he did not have to comply with the request. Nevertheless, Anthanasiou voluntarily proceeded to open the trunk of his vehicle. Contained therein, in plain view, were numerous bales encased in clear plastic and sealed with masking tape. Through the clear plastic, the 360 pounds of raw marijuana were readily visible.

Petitioners were indicted for possession of marijuana in violation of N.J.S.A. 24:21-20(a)(2) (count one) and possession of marijuana with intent to distribute in violation of N.J.S.A. 24:21-19(a)(1) (count two). Prior to trial, petitioners moved to suppress the marijuana seized from their automobile. An evidentiary hearing was conducted on November 20, 1979, at the conclusion of which the Honor-

able William Marchese, Judge, Superior Court, denied petitioners' motions to suppress. On January 14, 1980 petitioners entered a negotiated *retraxit* plea of guilty to Count Two of the indictment in return for the dismissal of Count One. On February 22, 1980, both defendants were sentenced to terms of two to three years in State Prison.

Petitioners appealed the denial of their suppression motions to the Superior Court of New Jersey, Appellate Division. On July 14, 1980 the Court affirmed the judgment below in an unreported written opinion. (Petitioner's Appendix A-1 to A-3). On September 30, 1980 petitioners' petition for certification was denied by the New Jersey Supreme Court. (Petitioners' Appendix A-4). The instant petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division, follows.

Summary of Argument

Delaware v. *Prouse,* 440 U.S. 648 (1979) proscribes random motor vehicle stops heretofore permitted in New Jersey by statutory as well as case law. The facts of record do not implicate the proscription of the *Prouse* doctrine at all. Even assuming the implication of the *Prouse* doctrine, however, there is in general, no constitutional right to retroactive application of exclusionary rule doctrines. Since *Delaware* v. *Prouse, supra,* represents major changes for New Jersey law enforcement personnel and the courts, the opinion should be given only prospective application. Moreover, great deference should be accorded to the judgment of the New Jersey Supreme Court which passed upon this very question and afforded prospective only application to *Prouse* in *State* v. *Carpentieri,* 82 N.J. 546, 414 A.2d 966 (1980).

ARGUMENT

POINT I

The principles of the *Delaware* v. *Prouse* are not applicable to the instant factual situation.

Petitioners contend that insufficient probable cause existed to jusify the initial stop of their vehicle. This argument, however, belies the proofs adduced at the motion to suppress.

As observed in the statement of the case *ante,* and as established during the suppression proceedings, the articulable suspicion of a safety hazard existed to mandate the stop. As was established during the suppression proceedings, the stop of petitioner's vehicle was not at all random, but was precipitated by its weighted down appearance and slow rate of speed in the center lane of a major highway. Respondent would suggest that the lowered rear end was symptomatic of poor suspension, faulty shock absorbers, underinflated tires, or any other of a number of conditions which may have made the vehicle potentially hazardous. Accordingly, it was inarguably Trooper Bergen's duty to direct petitioners' vehicle to the side of the road for inspection. See N.J.S.A. 39:4-56 which prohibits the driving of a vehicle in such a condition as is likely to delay the flow of traffic or cause an accident. And see, *State* v. *Hock,* 54 N.J. 526, 533 (1969), 257 A.2d 699, *cert.* den. 399 U.S. 930 (1970), wherein the Supreme Court of New Jersey approved the procedure of ordering a vehicle believed to be in violation of the Motor Vehicles Act to the curb and requesting the motorist's driver's license and vehicle registration.

Although the *Delaware* v. *Prouse,* 440 U.S. 648 (1979) decision nullifies the random motor vehicle procedure here-

tofore sanctioned in this State, it in no way undermines the general police authority to enforce traffic and vehicular statutes and regulations. Indeed, this Court's concern for the effective maintenance and enforcement of such motoring requirements find repeated expression in the text of the *Prouse* opinion. Its proscription, as previously noted, encompasses only the totally random stop.

In view of the foregoing, Respondent respectfully submits that *Prouse* has no application to the situation at bar. The stop of the vehicle herein was not random but was based on legitimate articulable factors.

POINT II

The petition does not present a substantial question because this Court's prior decisions indicate that *Delaware* v. *Prouse* should be applied prospectively only, and thus not to the instant matter.

Petitioners contend that the courts of the State of New Jersey have violated their constitutional right to be free of unreasonable searches and seizures by refusing to apply the decision in *Delaware* v. *Prouse,* 440 U.S. 648 (1979) retroactively. The instant stop occurred on February 24, 1979. On March 20, 1979 *Delaware* v. *Prouse, supra* was decided by the Court.

At the outset, Respondent would note that this court has recently denied a petition for certiorari submitted by a New Jersey petitioner, to raise the precise issue raised herein in *Stevens* v. *New Jersey,* —— U.S. ——, 28 Cr.L. 4062 (Docket No. 80-135, *cert.* den. November 3, 1980).

It should be remembered that criminal defendants do not have a constitutional right to have evidence suppressed.

See, *Stone* v. *Powell,* 428 U.S. 465, 486-487 (1976); *United States* v. *Peltier,* 422 U.S. 531, 535-537 (1975); *Desist* v. *United States,* 394 U.S. 244, 250 (1969). Rather, they have the right to be free from unreasonable searches and seizures. Although of constitutional origin [*Mapp* v. *Ohio* 367 US 643, 649-654 (1961)] the exclusionary rule is merely a "procedural weapon" for the enforcement of constitutional rights. *Desist* v. *United States, supra* at 250; *Linkletter* v. *Walker,* 381 U.S. 618, 638 (1965). Therefore, this Court in *Linkletter* specifically declined to give retroactive effect to its earlier decision in *Mapp* v. *Ohio, supra.*

There is no *per se* constitutional violation inherent in refusing to grant retroactive effect to new exclusionary rule doctrines. Indeed, in *Linkletter,* this Court unequivocally stated that "the Constitution neither prohibits nor requires retrospective effect. As Justice Cardozo said, 'We think the Federal Constitution has no voice on the subject.'" 381 U.S. at 629 (citing *Great Northern Ry Co.* v. *Sunburst Oil & Refining Co.,* 287 U.S. 358, 364 (1932). Moreover, this Court has been extremely reluctant to give retroactive effect to constitutional rules which do not impact on the truth finding process. *Gosa* v. *Mayden,* 413 U.S. 665 (1975). In *United States* v. *Peltier, supra,* this Court found that the exclusion of evidence obtained in violation of Fourth Amendment guarantees came within this classification. 442 U.S. at 534-537. See also *Brown* v. *United States,* 422 U.S. 916 (1975).

Respondent emphasizes that *Prouse, supra,* has no application to the case currently under review. (See Point I, *ante*). However, should this Court view the instant matter as an appropriate vehicle to decide the retroactivity of *Prouse, supra,* we offer the following observations. The application of new extensions of the exclusionary rule has been expressly rejected by this Court. See, *e.g., Williams*

v. *United States,* 401 U.S. 646 (1970) and *Desist* v. *United States, supra.* Any conceivable doubt as to the Court's position on this issue was totally removed in *United States* v. *Peltier, supra,* wherein the condemnation of roving border patrol searches expressed in *Almeida-Sanchez* v. *United States,* 413 U.S. 266 (1973), was accorded no effect in the subsequent *Peltier* case. This Court prefaced its determination thusly:

> Since 1965 this Court has repeatedly struggled with the question of whether rulings in criminal cases should be given retroactive effect. In those cases where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials . . . the doctrine has quite often been applied retroactively. It is indisputable, however, that in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule, whereby concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the factfinding process, the Court has concluded that any such new constitutional principles would be accorded only prospective application. *United States* v. *Peltier, supra* at 535; (emphasis supplied; citations and footnote omitted).

Respondent believes that utilization of the proper standards and, more importantly, appreciation of the fundamental purpose of the exclusionary rule clearly militate in favor of prospective only application of the *Prouse* decision. In *Stovall* v. *Denno,* 388 U.S. 293 (1967), this Court declared that the tests to be used in determining whether to grant retroactive application to constitutional rules are:

> (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standard.

Id. at 297. See *Johnson* v. *New Jersey,* 384 U.S. 719, 728 (1960).

When these criteria are applied to *Prouse* it becomes evident that only prospective application should be given this opinion. The purposes of the exclusionary rule can in no way be advanced by giving retroactive application to new decisions in the law of search and seizure. If the police gain evidence in a manner which they have reason to believe is acceptable and that evidence is suppressed due to a later change or clarification of the law in that area the only benefit will be to the criminal who is set free even though there is no doubt as to his guilt. Our society cannot gain since there could not possibly be any deterrent effect in such application of the exclusionary rule. The exclusionary rule and the rules set forth in *Prouse* cannot be advanced by retroactive application. See, *Brown* v. *Louisiana,* —— U.S. ——, 100 S.Ct. 2214, 2219 (1980); *United States* v. *Peltier, supra* at 538-539; *State* v. *Carpentieri,* 82 N.J. 546, 414 A.2d 966 (1980); *State* v. *Patino,* 80 N.J. 1, 5 n.2, 401 A.2d 1094, 1095 (1980); *State* v. *Howery,* 80 N.J. 563, 569, 401 A.2d at 635 (1979).

With regard to the second factor, it is clear that in New Jersey, police officers relied substantially on statutory as well as case law. The halt preceding the search and seizure in the case at bar occurred on February 24, 1979, approximately one month prior to the Supreme Court's invalidation of random stops in *Prouse.* At the time of the instant stop, however, random stops for routine license and

registration checks were in all respects proper and specifically sanctioned by both statute and decisional law in this State. N.J.S.A. 39:3-29. See also *State* v. *Gray,* 59 N.J. 563, 567, 285 A.2d 1, 5 (1971); *State* v. *Marchitto,* 132 N.J. Super. 511, 514; 334 A.2d 354, 357 (App. Div. 1974), certif. den. 68 N.J. 163, 343 A.2d 450 (1975); *State* v. *Gammons,* 113 N.J. Super. 434, 437; 274 A.2d 69, 72 (App. Div. 1971), aff'd o.b. 59 N.J. 451; 283 A.2d 897 (1971); *State* v. *Braxton,* 111 N.J. Super. 191, 196; 268 A.2d 40, 45 (App. Div. 1970), rev'd on other grounds 57 N.J. 286, 271 A.2d 713 (1970); *State* v. *Kabayana,* 98 N.J. Super. 85, 88; 236 A.2d 164, 167 (App. Div. 1967), aff'd o.b. 52 N.J. 507; 246 A.2d 714 (1968); *Blanchard* v. *Town of Kearny,* 145 N.J. Super. 246, 248; 367 A.2d 464, 468 (Law Div. 1976), aff'd o.b. 153 N.J. Super. 158; 379 A.2d 288 (App. Div. 1977). Prior to the decision in *Prouse* there was no reason to believe that license and registration inspections were violative of the Fourth Amendment. Indeed, this Court in *Arkansas* v. *Sanders,* 442 U.S. 753 (1979), recognized that both courts and law enforcement officers have often found difficulty in applying previous Fourth Amendment decisions to individual cases. To hold police officers to a standard which the Supreme Court of the United States has found the courts unable to meet would be unreasonable.

Moreover, there can be little doubt that retroactive application of *Prouse* would place a significant burden on the administration of justice. The New Jersey Supreme Court in *State* v. *Carpentieri, supra,* affirmed State appellate courts in *State* v. *Kahlon,* 172 N.J. Super. 331, 411 A.2d 1178, (App. Div. 1980) and *State* v. *Mann,* 171 N.J. Super. 173, 408 A.2d 440, (App. Div. 1979), to hold that *Delaware* v. *Prouse, supra,* would have prospective effect only in New Jersey. To reach this result, the *Carpentieri* Court relied upon this Court's opinion in *United States* v. *Peltier, supra,* and affirmed its own decision in *State* v. *How-*

ery, supra and *State* v. *Nash,* 64 N.J. 464, 317 A.2d 689 (1974).

Based on the foregoing it is clear that *Delaware* v. *Prouse, supra,* has no application to the case at bar. The factual circumstances do not implicate the proscription against random stops, but in any event the decision should not be afforded retroactive application.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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